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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/628,420	07/29/2003	Thomas Lee	006943.00310	6264
66811 7590 02/06/2009 BANNER & WITCOFF, LTD. and ATTORNEYS FOR CLIENT NO. 006943 10 SOUTH WACKER DR. SUITE 3000 CHICAGO, IL 60606				
EXAMINER				
CHAWLA, JYOTI				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
02/06/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/628,420

Applicant(s)

LEE ET AL.

Examiner

JYOTI CHAWLA

Art Unit

1794

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 26 January 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 23-40.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☒ Other: See Continuation Sheet.

/JENNIFER MCNEIL/
Supervisory Patent Examiner, Art Unit 1794

Continuation of 11. does NOT place the application in condition for allowance because: Applicants' remarks address the references individually (Page 6, paragraphs 2-3). In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

On page 6, applicants appear to allege that Nakel reference is not valid as Nakel teaches beverage compositions that are "shelf stable with respect to calcium salts". This argument is not persuasive. Because Nakel teaches an aspect that is not claimed does not render Nakel unusable. Nakel reference is introduced to teach that for a lemon/lime or cola flavored beverage (Col. 6, lines 11-15) various ratios by weight of organic acids to citric acid and organic acid, phosphoric acid and citric acid were known at the time of the invention as is also disclosed by applicants in specification page 5, paragraphs [0018] and [0019]. Applicants disclose that organic acid having a smaller dissociation constant as compared to citric and phosphoric acids (specification, page 5, [0015], step ii)). Regarding the specific organic acid applicants instantly recite adipic acid, which is taught by Braun in the obviousness rejection (see Braun Column 5, lines 53-62). Nakel discloses malic acid (which is similar to adipic acid in that it also has a smaller dissociation constant than citric and phosphoric acids; also see applicants' specification pages 5 -6). Nakel also teaches that malic acid (organic acid) to citric acid ratio in a beverage are known to minimize precipitation (Col. 4, lines 31-36 and 52-63), which results in improved storage stability (Column 5, lines 36-34 also see Column 10-11 Embodiments 1, 2 and Table in Column 13). Thus, the argument that Nakel is not applicable because it is "relevant only for beverages containing specific cations and acids" is not persuasive as all the specific acids (i.e. citric acid, adipic acid and phosphoric acid, or their equivalents) as claimed are disclosed by combination of Braun and Nakel.

It appears that applicants are alleging that the quoted references do not have the functionality of the claimed invention. In other words, applicants appear to allege that the references are not relevant as the teachings of references do not teach the claimed limitation of "wherein for up to seven months following manufacture the beverage is more tart than a beverage without such ratio". It is noted that the claim only requires that the claimed beverage is "more tart" compared to any comparison beverage, wherein the comparison beverage only has to meet the limitation that the comparison beverage is "a beverage without said ratio" (i.e., said ratio of acids). Thus, a large number of beverages (for example, very tart beverage with a pH of 2.5) will read on the above comparison beverage because as recited, the only criterion to be met is that it is "a beverage without said ratio".

Continuation of 13. Other: Applicants' claim and fee calculation sheet still indicates 24 claims pending, whereas only 18 claims are pending (23-40) .